Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term 1996

CENTEX BATESON CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

TAXATION AND REVENUE DEPARTMENT
of the STATE OF NEW MEXICO,

Respondent.

On Petition For Writ Of Certiorari To The New Mexico Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the federal Indian preemption analysis applies to state taxation of the proceeds of a contract between a contractor and a federal Indian agency for a construction project on an Indian reservation for the exclusive benefit of members of federally recognized Indian tribes.

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Petitioner, Centex Bateson Construction Company, Inc., provides this list pursuant to the provisions of Sup. Ct. R. 29.6.

Centex Bateson Construction Company, Inc., is now known as Centex Construction Company, Inc. Centex Construction Company, Inc., is a wholly owned subsidiary of Centex Construction Group, Inc. Centex Construction Company, Inc., does not have any nonwholly owned subsidiaries.

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CITATIONS TO OPINIONS AND ORDERS OF COURTS AND ADMINISTRATIVE AGENCIES BELOW

The unreported Memorandum Opinion and Order of the New Mexico Court of Appeals in *Centex Bateson Construction Company, Inc. v. Taxation and Revenue Department of the State of New Mexico,* No. 17,442 (filed March 14, 1997) is reprinted in Appendix A to this Petition.

The unreported Order denying certiorari of the New Mexico Supreme Court in *Centex Bateson Construction Company, Inc. v. Taxation and Revenue Department of the State of New Mexico,* No. 24,258 (filed April 16, 1997) is reprinted in Appendix B to this Petition.

The Decision and Order of the New Mexico Taxation and Revenue Department, *In the Matter of the Protest of Centex Bateson Construction Company,* No. 96-14 (filed April 26, 1996), is reprinted in Appendix C to this Petition.

JURISDICTION

The Memorandum Opinion and Order of the New Mexico Court of Appeals was entered March 14, 1997. The Order of the New Mexico Supreme Court denying the Petitioner's Petition for Writ of Certiorari to the New Mexico Court of Appeals was entered April 16, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the Indian Commerce Clause of the United States Constitution, provisions of the federal Indian Health Care Improvement Act, federal regulations relating to Indian self-determination and New Mexico statutes regarding gross receipts and compensating use excise taxes. The full text of the following constitutional, statutory and regulatory provisions are set out in Appendix D to this Petition:

U.S. Const. art. I, § 8, cl. 3

25 U.S.C. § 1601

25 U.S.C. § 1631

42 C.F.R. § 36.201(a)

N.M.Stat.Ann. § 7-9-4 (Michie 1995 Repl. Pamp.)

N.M.Stat.Ann. § 7-9-7 (Michie 1995 Repl. Pamp.)

STATEMENT OF THE CASE

This case arises out of Centex Bateson Construction Company, Inc.'s ("Centex") involvement, as prime contractor, on a federal Indian Health Service project for construction of a hospital known as the Shiprock Comprehensive Health Care Facility at Shiprock, New Mexico. The construction was conducted wholly on the Navajo Indian tribal reservation, was done for the exclusive benefit of federally recognized Indians, and was financed solely with federal funds.

Planning for and construction of the hospital was done under the provisions of Section 301 of the Indian Health Care Improvement Act, 25 U.S.C. § 1601(a). Under that statute, the size, location, type and other characteristics of the hospital were determined in consultation with the Navajo Tribe. The process involves tribal approval of the site selection and tribal allowance of access for the contractor to tribal lands for the construction. 25 U.S.C. § 1631(a)(1). The decision whether the construction contract would be made with the Tribe or with the United States Department of Health and Human Services, Indian Health Service, was made by the Navajo Tribe as an act of self-determination under the Indian Self-Determination Act, 42 U.S.C. § 2001, et seq. See, 42 C.F.R. § 36.201(a)(4). The State of New Mexico had no involvement in the planning or construction of the hospital.

Centex, through a competitive bidding process, was awarded Contract No. 161-92-0027 ("the contract") by the Department of Health and Human Services. The contract provided for Centex, as prime contractor, to build the 75 bed Indian Health Service hospital at Shiprock, New Mexico. The total contract price, including all modifications, was $34,531,117.00.

In the contract, the Department of Health and Human Services excluded any funds for payment of New Mexico state gross receipts and compensating use excise taxes. The contract stated that "the cost of such taxes shall not be included in the offer/contract." The contract also provided that Centex would advise the Department of Health and Human Services of any attempt by the State of New Mexico to impose gross receipts and compensating taxes and would take action to oppose the

imposition of those taxes. Last, the contract stated that, in the event the State of New Mexico is ultimately successful in its efforts to collect gross receipts and compensating taxes, the contract will be equitably adjusted to account for the additional cost of the taxes.

Centex was issued a notice to proceed with the construction by the Department of Health and Human Services on October 5, 1992. Construction of the hospital was commenced and was completed as of November 18, 1994.

During the course of construction, Centex did not pay any gross receipts or compensating taxes to the State of New Mexico. Centex did, however, submit regular reports to the New Mexico Department of Taxation and Revenue, stating on the reporting forms that Centex was exempt from taxation. Centex also issued non-taxable transaction certificates to its subcontractors and suppliers.

The State of New Mexico, by statute, imposes an excise tax denominated as the "gross receipts tax" for the privilege of engaging in business on any person engaging in business in New Mexico. N.M. Stat. Ann. § 7-9-4 (Michie 1995 Repl. Pamp.). The State also imposes a "compensating tax" for the privilege of using tangible property in New Mexico. N.M. Stat. Ann. § 7-9-7 (Michie 1995 Repl. Pamp.).

On October 18, 1995, Respondent, New Mexico Department of Taxation and Revenue, issued Assessment No. 1970786 to Centex. The Assessment assessed gross receipts taxes in an amount of $1,830,474.43, compensating taxes in the amount of $1,451.98, and interest of $464,152.19 accrued as of the date of the assessment.

Interest has continued to accrue at the New Mexico statutory rate.

Centex filed its protest of the tax assessment on January 11, 1996. In its protest, Centex asserted that, under prior decisions of this Court, New Mexico's imposition of gross receipts and compensating taxes on the hospital construction project was preempted by federal law. Centex took the position that the special Indian preemption analysis set out in opinions of this Court, including *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965), *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), and *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982), controlled disposition of the case and, under that analysis, the taxes imposed by the State were preempted.

In response to the protest, the Department of Taxation and Revenue filed a motion for summary judgment. In the motion, the Department relied on the prior New Mexico Supreme Court decision in the case of *Blaze Construction Company, Inc. v. Taxation and Revenue Department*, 118 N.M. 647, 884 P.2d 803 (1994), *cert. denied*, ___U.S. ___, 115 S.Ct. 1359, 131 L.Ed.2d 216 (1995).[1] The Department argued that under the *Blaze* decision, because the construction contract was with an agency of the federal

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[1] The *Blaze* case involved a contract for the construction across Indian reservations of roads which were available for general public use. This case involves construction of a hospital which is to provide health care solely to members of federally recognized Indian tribes.

government, rather than the Navajo Tribe, the Indian preemption analysis did not apply. Instead, the case was governed by general federal contractor preemption, and, in light of *United States v. New Mexico*, 455 U.S. 720 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982), as a matter of law, New Mexico's taxes were not preempted.

Centex responded to the Department's motion contending that summary judgment was premature because additional factual development was necessary to apply the Indian preemption analysis. Centex specifically indicated that it intended to produce evidence showing the pervasive and comprehensive federal involvement in the financing, construction, and operation of the hospital, the tribal interests in the construction and operation, and the lack of state involvement in the construction and operation of the hospital.

The Department of Taxation and Revenue Hearing Officer did not hold a hearing and did not make any findings of fact concerning the relative burdens the application of the taxes would impose on the state, federal and tribal interests. The Hearing Officer held that, as a matter of law, the special Indian preemption analysis did not apply to this case. (App. 14). The Decision and Order of the Hearing Officer was entered on April 26, 1996, granting the Department's motion for summary judgment. (App. 7-14).

Centex filed its notice of appeal, appealing the decision of the Hearing Officer to the New Mexico Court of Appeals on May 24, 1996. Following briefing, the Court of Appeals issued its Memorandum Opinion on March 14, 1997, affirming the decision of the Hearing Officer. (App.

2). The New Mexico Court of Appeals held that, under the New Mexico Supreme Court's prior decision in the *Blaze* case, the Indian preemption doctrine was not applicable because Centex entered into a contract directly with an agency of the federal government, rather than with the Tribe. The New Mexico Court held that the general federal contractor preemption doctrine governed this case and, under the decision in *United States v. New Mexico*, the state taxes were not preempted. (App. 4-5).

Centex timely filed a Petition for Writ of Certiorari, asking the New Mexico Supreme Court to review the decision of the New Mexico Court of Appeals. The Petition was denied by the New Mexico Supreme Court on April 16, 1997. (App. 6).

REASONS FOR GRANTING THE WRIT

I. THE NEW MEXICO COURT'S DECISION CONFLICTS WITH PRIOR PRECEDENTS OF THIS COURT

The United States Constitution grants to Congress broad power to regulate tribal affairs under the Indian Commerce Clause. U.S. Const. art. I, § 8, cl. 3. This Court has previously held that this broad power to regulate tribal affairs and the semi-autonomous status of Indian tribes have erected two independent but related barriers to the exercise of state authority over the activities of non-Indians on an Indian reservation. First, state authority may be preempted by federal law. Second, the state power may interfere with the tribe's abilities to exercise its sovereign functions. These two distinct barriers are

independent. Either, standing alone, is a sufficient barrier to the exercise of state authority. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43, 100 S.Ct. 2578, 2582-83, 65 L.Ed.2d 665 (1980); *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837, 102 S.Ct. 3394, 3398, 73 L.Ed.2d 1174 (1982).

The issue in this case involves the first barrier to preemption of New Mexico's taxing authority, preemption by federal law. The case does not involve any claim that the State tax infringes on the sovereignty "right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470, 99 S.Ct. 740, 746, 58 L.Ed.2d 740 (1979).

The special Indian preemption doctrine originated with this Court's decision in *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). The Court in the *Warren Trading Post* case applied the Indian preemption analysis to an Arizona sales tax imposed on a non-Indian business operating a trading post on an Indian reservation under a license granted by the United States Commissioner of Indian Affairs. 380 U.S. at 685-86, 85 S.Ct. at 1243. This Court has subsequently applied the Indian preemption doctrine in cases involving non-Indians contracting with an Indian tribe to carry out on reservation activities, and to cases involving construction contracts with tribal entities for construction on tribal lands funded by a federal agency. See, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Ramah*

Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982).

In *White Mountain Apache Tribe*, this Court observed:

> "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest [citations omitted]. **More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.**
>
> . . .
>
> This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."

448 U.S. at 144-45, 100 S.Ct. at 2584 (emphasis added).

This Court has consistently applied the Indian preemption analysis to activities located on an Indian reservation, without setting a per se or rigid rule with respect to the identities of the contracting or licensing parties, whether the contract is directly with the tribe, whether the contract is administered or approved by a federal agency, or whether federal funds are used to pay for the project. See, *Warren Trading Post*, 380 U.S. at 685-86, 85 S.Ct. at 1243; *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 100 S.Ct. 2592, 65 L.Ed.2d 684

(1980); *Ramah Navajo School Board*, 458 U.S. at 834-35, 102 S.Ct. at 3396-97; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989). Rather than a rigid rule, preemption analysis in this area has required a particularized examination of the relevant state, federal, and tribal interests. *White Mountain Apache Tribe*, 448 U.S. at 142, 144, 100 S.Ct. at 2583, 2584.

The New Mexico Court of Appeals' decision, following the New Mexico Supreme Court's decision in *Blaze Construction Co., Inc. v. Taxation and Revenue Department of the State of New Mexico*, 118 N.M. 647, 884 P.2d 803 (1994), adopted a bright line rule for application of the Indian preemption doctrine, based on the identity of the contracting parties. (App. 4-5). The New Mexico Court's adoption of a rule that the Indian preemption analysis does not apply when the contract is with an agency of the federal government rather than the tribe conflicts with the prior precedent of this Court.

Further, in adopting the rule that Indian preemption does not apply when the contract is not directly with the tribe, the New Mexico Court of Appeals examined only one of the two independent barriers to the exercise of state authority over activities on Indian reservations. In determining that Indian preemption applies only where the contract is made or business is conducted directly with Indian tribes or tribal members, the Court resolved the case solely on the sovereignty barrier. (App. 4). See, also, *Blaze Construction Co., Inc.*, 118 N.M. at 650 (rejecting application of Indian preemption and stating: "[t]o equate Indian tribes and the BIA in this way ignores the fact that

tribal governments have retained an element of sovereignty separate and distinct from the federal government.") The Court of Appeals' decision ignores the second barrier to exercise of state taxing authority, preemption by federal law. In determining that the Indian preemption doctrine does not apply whenever the contract is with an agency of the federal government rather than a tribe, and in deciding the case without examination of the second barrier, federal law preemption, the New Mexico Court of Appeals has adopted a rule for the application of federal Indian preemption analysis which conflicts with the prior precedents of this Court. Certiorari should be granted in this case based on the adoption of a conflicting rule by the New Mexico Courts on the application of federal law.

II. THERE IS A PRELIMINARY DIVISION OF THE STATES ON THE QUESTION

The New Mexico Court of Appeals, in this case, and the New Mexico Supreme Court, in the prior decision in *Blaze Construction Co., Inc.*, adopted a rule that Indian preemption analysis does not apply to exercise of state authority over on-reservation activities of non-Indians unless the non-Indian has contracted directly with the tribe or a tribal member. (App. 4-5); 118 N.M. at 650. Subsequent to the New Mexico Court of Appeals decision in this case, the Arizona Court of Appeals rendered its decision in *State of Arizona, ex rel. Arizona Department of Revenue v. Blaze Construction Company*, 242 Ariz. Adv. Rep. 3, 1997 WL 205799 (Ct. App. 1997), a case involving contracts with the federal Bureau of Indian Affairs for

construction of roads on an Indian reservation.[2] In its decision, the Arizona Court rejected the rule adopted by the New Mexico Courts.

In discussing the preemption analysis as set out in prior precedents of this Court, the Arizona Court of Appeals stated:

> "This formulation neither suggests nor implies that Indian law pre-emption analysis is inapplicable when the on-reservation activities of non-Indians over which the state seeks to exercise authority do not arise out of direct commercial relations with the tribe or a tribal entity. Moreover, nothing in the Court's application of that analysis in White Mountain suggests that it implicitly follows any such limitation.

1997 WL 205799, at 4.

There is a preliminary division of the states on the issue of whether the Indian preemption analysis applies to contracts for construction on Indian reservations, when the contract is with a federal agency, rather than an Indian tribe. This Court should grant certiorari to resolve the division among the states on the issue.

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[2] At the time of filing this Petition, it is unknown whether the Arizona Supreme Court will grant certiorari to review the decision of the Arizona Court of Appeals.

III. THE QUESTION PRESENTED IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT

The area of Indian health care is the subject of comprehensive federal legislation. See, 25 U.S.C. § 1601, *et seq.* Congress has recognized that federal health services are required by the federal government's historical and unique legal relationship with and responsibility to the American Indian people. 25 U.S.C. § 1601(a). The federal agency charged by statute with the responsibility for Indian health care is the Indian Health Service of the Department of Health and Human Services.

The responsibilities of Indian Health Service include the construction and operation of health care facilities on the many reservations and tribal lands in the United States. By federal law, construction of health care facilities is accomplished in consultation with the various Indian tribes. 25 U.S.C. § 1631(a). Construction of the Indian health care facilities is conducted by private contractors who contract, as determined by tribal self-determination, either with Indian Health Service or with the Indian tribe. 42 C.F.R. § 36.201(a)(4). Construction of health care facilities is financed with federal funding, both through the contracts with Indian Health Service, and through grants to the tribes from Indian Health Service. 42 C.F.R. § 36.201(a)(6).

In 1982, this Court handed down the decision in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico,* 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982). *Ramah* involved imposition of New Mexico's gross receipts tax on construction by a private contractor of a

school on the Navajo reservation in New Mexico. The Ramah Navajo School Board, a tribal entity, contracted with the federal Bureau of Indian Affairs for design and construction of the school. Funding for the construction was provided by the Bureau of Indian Affairs. The School Board then subcontracted the actual construction of the school to a private contractor. 458 U.S. at 834-35, 102 S.Ct. at 3396-97.

This Court applied the Indian preemption analysis in *Ramah*, concluding that New Mexico's imposition of gross receipts taxes on the school construction project was pre-empted. This Court found that the comprehensive federal regulatory scheme for Indian education required preemption of exercise of the State's taxing authority. 458 U.S. at 841-42 and 846-47, 102 S.Ct. at 3400-401 and 3403. In *Ramah*, the Court stated:

> "The question whether federal law, which reflects the related federal and tribal interests, pre-empts the State's exercise of its regulatory authority is not controlled by standards of pre-emption developed in other areas."

458 U.S. at 838, 102 S.Ct. at 3398.

In 1982, this Court also decided *United States v. New Mexico*, 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982). The Court held in *United States v. New Mexico*, that even though the supremacy clause prohibits direct state taxation of the United States, contractors that contract with the federal government are not immune from taxation. 455 U.S. at 733-34, 102 S.Ct. at 1382. State taxation of federal contractors is not preempted, even where federal

funds are used to pay the taxes. 455 U.S. at 734-35, 102 S.Ct. at 1383.

The New Mexico Court of Appeals determined that the Indian preemption analysis, as applied in the *Ramah School Board* case, did not apply to the construction contract in this case. The Court, instead, held that, where the contract was with a federal agency, the principles of *United States v. New Mexico* governed disposition of the case. (App. 3-5).

The federal regulation of Indian health care facilities is equally as comprehensive as the federal regulation of schools on Indian lands involved in *Ramah*. In light of the significant number of health care contracts involving Indian health care facilities, and the pervasive federal interest in and comprehensive federal regulation of Indian health care, the question of whether the federal Indian preemption analysis applies to the activities of private contractors on Indian reservations under construction contracts with Indian Health Service is a federal question of substantial importance which should be resolved by this Court.

CONCLUSION

Three important reasons exist for this Court to resolve the question presented in this case. First, the New Mexico Court of Appeals has adopted a rule for determination of the application of federal Indian preemption analysis that is in conflict with the prior precedents of this Court. Second, the various states are preliminarily dividing on the question of whether the special Indian

preemption analysis applies where a non-Indian contractor engaging in construction on an Indian reservation enters into a contract with a federal agency rather than with the Indian tribe. Last, the question of whether contracts with federal agencies for construction of Indian facilities on tribal lands is governed by the Indian preemption doctrine or, instead, by principles of general federal contractor preemption is an important federal question which has not, but should be, resolved by this Court.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CENTEX BATESON CONSTRUCTION COMPANY, INC.,

Protestant-Appellant,

vs. No. 17,422

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,

Respondent-Appellee.

APPEAL FROM THE NEW MEXICO TAXATION AND REVENUE DEPARTMENT
Gerald B. Richardson, Hearing Officer

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MEMORANDUM OPINION
(Filed Mar. 14, 1997)

Bustamante, Judge.

Centex Bateson Construction Company, Inc. (Taxpayer) appeals the hearing officer's decision granting summary judgment in favor of the State of New Mexico. Taxpayer raises two points on appeal. First Taxpayer contends that the Indian preemption doctrine applies and accordingly, that it is exempt from state taxation. In the alternative, Taxpayer argues that the hearing officer, at least, should have conducted a factual inquiry to determine whether Indian preemption principles apply. For the reasons that follow, we reject these arguments and affirm the hearing officer's decision.

FACTS

Through a competitive bidding process, Taxpayer contracted with the United States Department of Health and Human Services to construct the Shiprock Comprehensive Health Care Facility (Hospital) on the Navajo Reservation. During the course of construction, Taxpayer executed nontaxable transaction certificates to its suppliers and subcontractors. Ultimately, Taxpayer did not remit gross receipts tax from its receipts in constructing the Hospital nor did it pay compensating use tax on its property used during construction. Consequently, the Taxation and Revenue Department (Department) issued an assessment against Taxpayer for these taxes, including associated penalties and interest. Taxpayer filed a protest to the assessment which led to the hearing officer's decision.

APPLICABILITY OF INDIAN PREEMPTION DOCTRINE

The hearing officer was presented with the question of whether to apply the general federal preemption test or the historically developed Indian preemption doctrine (Doctrine). *See Blaze Constr. Co. v. Taxation & Revenue Dep't*, 118 N.M. 647, 651-52, 884 P.2d 803, 807-08 (1994) (discussing the evolution of the Indian preemption doctrine), *cert. denied*, 115 S. Ct. 1359 (1995). The hearing officer determined first, pursuant to *Blaze*, 118 N.M. at 649-50, 884 P.2d at 805-06, that the Doctrine was inapplicable. Next, the hearing officer determined that under general federal preemption principles, the Department was entitled to summary judgment. *See United States v. New Mexico*, 455 U.S. 720, 734 (1982) (the federal government's constitutional immunity from state taxation may not be conferred on a third party simply because the tax has an effect on the United States, or even because the federal government shoulders the entire economic burden of the levy; immunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the government); *see also United States v. County of Fresno*, 429 U.S. 452, 460 (1977) ("So long as the tax is not directly laid on the Federal Government, it is valid if nondiscriminatory . . . or until Congress declares otherwise.") (citation omitted.)

On appeal, Taxpayer does not challenge the hearing officer's determination in regard to general federal preemption principles. *See Stueber v. Pickard*, 112 N.M. 489, 491, 816 P.2d 1111, 1113 (1991) (unchallenged findings are binding on appeal). Instead, Taxpayer relies on *Ramah Navajo School Board, Inc., v. Bureau of Revenue*, 458 U.S. 832

(1982), *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), and other cases in support of its contention that the Doctrine applies and that the Hospital project was exempt from state taxation.

Taxpayer's reliance on these cases is misplaced. These cases do not decide the threshold question of the Doctrine's applicability. Instead, they only apply the Doctrine. Further, they do not set forth any guidelines which dictate when the Doctrine is applicable.

Recently, the New Mexico Supreme Court in *Blaze Constr. Co.* clarified the initial inquiry regarding the Doctrine's applicability. Considering many of the cases Taxpayer cites, the New Mexico Supreme Court stated that the U.S. Supreme Court has only applied the Doctrine in cases where contracts were made or business was conducted *directly* with Indian tribes or tribal members. *Blaze Constr. Co.*, 118 N.M. at 649, 884 P.2d at 805 (emphasis added). Consequently, the Court held that when a contractor contracts directly with a federal overnment [sic] agency rather than Indian tribes or tribal members, the Doctrine is inapplicable and the contractor is subject to state taxes just as any other federal contractor would be. *Id.* at 650, 884 P.2d at 806.

In this case, Taxpayer does not dispute that it contracted directly with the United States Department of Health and Human Services, a federal government agency. *See Stueber*, 112 N.M. at 491, 816 P.2d at 1113. Under *Blaze Constr. Co.*, since Taxpayer contracted

directly with a federal government agency rather than directly with the Navajo tribe, the Indian preemption doctrine is inapplicable and Taxpayer is subject to state taxes just as any other federal contractor would be. Accordingly, the hearing officer was not required to conduct a factual inquiry to balance the competing interests of the state, federal, and tribal governments.

The hearing officer's decision is affirmed.

IT IS SO ORDERED.

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

/s/ A. Joseph Alarid
A. JOSEPH ALARID, Judge

/s/ James J. Wechsler
JAMES J. WECHSLER, Judge

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Wednesday, April 16, 1997

No. 24,258

CENTEX BATESON CONSTRUCTION, COMPANY, INC.,

Protestant-Petitioner,

vs.

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,

Respondent-Respondent.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied** in Court of Appeals number **17442.**

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT

By /s/ Jane Gurule
Chief Deputy

APPENDIX C

BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
CENTEX BATESON CONSTRUCTION COMPANY, INC., I.D. NO. 01-188389-00 8,
PROTEST TO ASSESSMENT NO. 1970786 No. 96-14

DECISION AND ORDER

This matter comes on for determination before Gerald B. Richardson, Hearing Officer, upon the Motion for Summary Judgment filed herein on February 20, 1996 by the Taxation and Revenue Department. Centex Bateson Construction Company, Inc. (hereinafter "Centex Bateson") was represented by Rodney L. Schlagel, Esq. of Butt, Thornton & Baehr, P.C. and by its Vice President and General Counsel, Frank J. Iuen III, Esq. The Taxation and Revenue Department (hereinafter "Department") was represented by Frank D. Katz, Chief Counsel.

Based upon the undisputed facts and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Centex Bateson, through a competitive bidding process, was awarded Contract No. 161-92-0027 ("the contract") by the United States Department of Health and Human Services ("DHHS") on September 23, 1992.

2. Under the contract, Centex Bateson constructed a 75-bed Indian Health Service hospital, known as the "Shiprock Comprehensive Health Care Facility" ("project") at Shiprock, New Mexico.

3. The project was constructed within New Mexico and within the Navajo Reservation.

4. The project was completed as of November 18, 1994.

5. The total contract price paid Centex Bateson by DHHS, including all modifications, was $34,531,117.

6. Under the terms of the contract, DHHS did not agree to reimburse Centex Bateson for the cost of "any New Mexico State gross receipts and compensating use excise taxes" imposed with respect to the project. The contract specifically stated that "the cost of such taxes shall not be included in the offer/contract." The contract further stated that the "Contractor shall promptly notify the contracting officer of any and all matters, correspondence, and/or enforcement efforts by the State relating to the imposition of any of the above taxes regarding this contract. The Contractor shall take action to oppose imposition of such taxes, to the extent that the Contracting Officers specifically directs the actual, necessary, reasonable, and documented costs of such directed action to be reimbursed by the Government pursuant to an equitable adjustment of the contract. Should the State of New Mexico be ultimately successful in enforcing compliance by the Contractor with any of the above taxes regarding this contract, the contract shall be equitably adjusted to account for such extra cost (and any associated interest or penalty), but without overhead or profit, provided that

the Contractor has complied with the terms of this clause."

7. Centex Bateson did not pay gross receipts tax upon its receipts from constructing the project nor did it pay compensating tax on its use of property in New Mexico with regard to the project.

8. Centex Bateson did execute nontaxable transaction certificates (NTTCs) to subcontractors and suppliers during construction of the project.

9. The Department issued Assessment No. 1970786 on October 18, 1995 in the amount of $1,830,474.43 in gross receipts tax, $1,451.98 in compensating tax and $464,152.19 in interest accrued to that date. Additional interest has continued to accrue at the statutory rate.

10. Centex Bateson requested and received a sixty day extension of time, through January 16, 1996 to file a protest to Assessment No. 1970786.

11. Centex Bateson filed its protest to Assessment No. 1970786 on January 11, 1996.

DISCUSSION

The issue presented herein is whether the imposition of state taxes upon the construction of the Shiprock Comprehensive Health Care Facility on the Navajo Reservation within New Mexico is preempted by federal law. Centex Bateson contracted directly with the United States Department of Health and Human Services to build the facility. There are two lines of federal preemption authority. The general rule with regard to state taxation of federal contractors is that the federal government's

immunity from state taxation does not shield it from the economic burden of nondiscriminatory state taxes applied to its contractors unless the intention to preempt the taxes has been made explicit in federal legislation. ***United States v. New Mexico,*** 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982). A distinct rule of federal preemption, which will be referred to as the Indian preemption doctrine, has evolved in cases involving state taxes imposed upon non-tribal entities for activities engaged in on Indian reservations. This doctrine can be traced from a series of Supreme Court decisions beginning with ***Warren Trading Post Co. v. Arizona Tax Comm'n,*** 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965), through ***Cotton Petroleum Corp. v. New Mexico,*** 490 U.S. 163, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989). The Indian preemption doctrine requires an analysis and balancing of the various state, tribal and federal interests to determine whether a state tax is preempted. ***See, Blaze Construction Co. v. Taxation and Revenue Department,*** 118 N.M. 647, 651-652, 884 P.2d 803, 807-808 (1984), *cert. denied,* 115 S.Ct. 1359 (1995) for a discussion of the evolution of the Indian preemption test.

The Department's Motion for Summary Judgment presents the issue of whether the general federal preemption test should be applied or whether the special Indian preemption test should be applied. The Department concedes that if the Indian preemption test is appropriate that significant additional factual development would be necessary and summary judgment would therefore be inappropriate at this juncture. The Department argues, however, that the general federal preemption test should be applied and that therefore summary judgment in the Department's favor is required.

The New Mexico Supreme Court has definitively ruled on the issue of which preemption test applies to the receipts of a federal contractor from activities occurring on Indian reservation lands within New Mexico in ***Blaze Construction, supra.*** Blaze Construction Company had gross receipts from constructing roads on Indian reservation lands within New Mexico pursuant to contracts with a federal agency, the Bureau of Indian Affairs. In its ruling on this issue the court stated:

> As the department correctly points out, the U.S. Supreme Court has only applied the Indian Preemption doctrine in cases where contracts were made or business was conducted directly with Indian tribes or tribal members. [Citations omitted.] In the cases at bar, Blaze and Arco contracted directly with the BIA, an agency of the federal government, rather than with an Indian tribe or with individual tribal members. *Because Blaze and Arco contracted with a federal government agency rather than with Indian tribes or tribal members, the Indian preemption doctrine is inapplicable, and Blaze and Arco are subject to state taxes, just as any other federal government contractor would be.* ***See New Mexico,*** 455 U.S. at 735 & 741, 102 S.Ct at 1383 & 1386. (emphasis added) 118 N.M. at 649-650.

It is noteworthy that the federal contractors in ***Blaze Construction*** had raised an argument very similar to the argument being made herein by Centex Bateson. Blaze had argued that the United States was fulfilling its responsibilities to the Indian people with whom it had a special relationship, and as such was a sort of partner in performing integral government functions, such as road building. Centex Bateson has adopted the arguments of

the United States being posited in a separate federal lawsuit wherein the United States argues that the state tax interferes with the federal government's obligation to provide health care to the Navajo Nation. The New Mexico Supreme Court rejected the argument that the BIA was a partner or agent of the Indian Tribes. *Id.*, 118 N.M. at 650. Similar arguments about the state taxes interfering with the federal government's sovereign functioning in *U.S. v. New Mexico* were soundly rejected by the Court, which noted:

> Thus, immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy.

Id., 102 S. Ct at 1382. The Court went on to note that:

> Similarly, immunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government.

Id., 102 S.Ct. at 1383. In essence, the Court found that in balancing the competing interests of state and federal government's sovereign taxing authority, the fact that the state tax burdens a federal program is simply insufficient to immunize the federal contractor from a non-discriminatory state tax. It found that the political process was uniquely adapted to striking the appropriate balance in accommodating the competing state and federal interests implicated by state imposition of taxes on federal contractors, and in the absence of explicit direction from Congress, immunity from state taxation would not be implied.

Centex Bateson's response to the Department's Motion for Summary Judgment is somewhat puzzling. It argues that this case is controlled by federal law, not state law, in apparent reference to the ***Blaze Construction*** decision by the New Mexico Supreme Court. While ***Blaze Construction*** is a state case, it applies only federal law. The issue in that case was *what* federal law applied, the standard federal preemption test or the Indian preemption test. Centex Bateson also adopted the arguments of the United States being made in separate litigation that the Indian preemption argument should be applied. This argument has been considered and addressed in the ***Blaze Construction*** case which governs its determination herein. Having determined that the federal preemption standard enunciated in ***United States v. New Mexico, supra,*** applies, that standard would dictate that no federal preemption exists unless Centex Bateson can allege material facts which would establish either evidence of explicit congressional preemption or of a discriminatory effect of New Mexico's tax. Centex Bateson has pointed to no such explicit statutory direction from Congress which would prohibit the imposition of the tax at issue herein. Nor has Centex Bateson alleged any material facts to demonstrate that New Mexico's gross receipts tax is discriminatory in its application to federal contractors.[1] Having concluded that the standard federal preemption test is applicable herein and there being no explicit congressional directive upon which to base a conclusion that

---

[1] Presumably, if New Mexico's gross receipts tax discriminated in any way against federal contractors, that would have been established in ***U.S. v. New Mexico, supra,*** and an entirely different result would have occurred in that case.

the Department's tax is preempted, it is concluded that summary judgment in favor of the Department is required and the Centex Bateson's protest to the imposition of state taxes should be denied.

CONCLUSIONS OF LAW

1. Centex Bateson filed a timely, written protest to Assessment No. 1970786 and jurisdiction lies over both the parties and the subject matter of this protest.

2. Because New Mexico's gross receipts tax has been imposed upon the receipts of a contractor who was directly under contract with an agency of the federal government and not with a tribe, tribal entity or tribal member, the Indian preemption doctrine is inapplicable and the standard federal preemption argument set forth in ***United States v. New Mexico,*** 455 U.S. 720 (1982) should be applied.

3. Centex Bateson has failed to allege material facts which would establish that New Mexico's gross receipts tax is either discriminatory, or in contravention of an express congressional enactment and therefore the tax is not preempted under the Supremacy Clause of the United States Constitution.

4. Summary judgment in favor of the Department is appropriate in this case.

For the foregoing reasons, Centex Bateson's protest **IS HEREBY DENIED.**

DONE, this 26th day of April, 1996.

/s/ Gerald B. Richardson
Gerald B. Richardson
Special Assistant Attorney General
Taxation and Revenue Department
PO Box 630
Santa Fe, NM 87509-0630
(505) 827-0732

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision and Order were served upon the parties by mailing a copies [sic] to Rodney L. Schlagel, Esq., c/o Butt, Thornton & Baehr, P.C., PO Box 3170, Albuquerque, NM 87190-3170 and Frank J. Iuen III, Vice President and General Counsel, Centex Bateson Construction Co., Inc., PO Box 19000, Dallas, Texas, 75219 and by hand-delivering a copy to Frank D. Katz, Esq., all on this 26th day of April, 1996.

/s/ Gerald B. Richardson
Gerald B. Richardson

APPENDIX D

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

U.S. Const. art. I, § 8, cl. 3

The Congress shall have Power . . .

Sec. 8, Cl. 3. Power of Congress to regulate commerce.

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

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25 U.S.C. § 1601

CHAPTER 18 INDIAN HEALTH CARE

GENERAL PROVISIONS

§ 1601. Congressional Findings

The Congress finds the following:

(a) Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people.

(b) A Major national goal of the United States is to provide the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level and to encourage the maximum participation of Indians in the planning and management of those services.

(c) Federal health services to Indians have resulted in a reduction in the prevalence and incidence of preventable illnesses among, and unnecessary and premature deaths of, Indians.

(d) Despite such services, the unmet health needs of the American Indian People are severe and the health status of the Indians is far below that of the general population of the United States.

(e)-(g) [Repealed]

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25 U.S.C. § 1631

HEALTH FACILITIES

§ 1631. Consultation; closure of facilities; reports

(a) Consultation; standards for accreditation. Prior to the expenditure of, or the making of any firm commitment expend, any funds appropriated for the planning, design, construction, or renovation of facilities pursuant to the Act of November 2, 1921 (25 U.S.C. 13), popularly known as the Snyder Act, the Secretary, acting through the Service, shall –

> (1) consult with any Indian tribe that would be significantly affected by such expenditure for the purpose of determining and, whenever practicable, honoring tribal preferences concerning size, location, type, and other characteristics of any facility on which such expenditure is to be made, and

(2) ensure, whenever practicable, that such facility meets the standards of the Joint Commission on Accreditation of Health Care Organizations by not later than 1 year after the date on which the construction or renovation of such facility is completed.

(b) Closure; report on proposed closure. (1) Notwithstanding any provision of law other than this subsection, no Service hospital or outpatient health care facility of the Service, or any portion of such a hospital or facility, may be closed if the Secretary has not submitted to the Congress at least 1 year prior to the date such hospital or facility (or portion thereof) is proposed to be closed an evaluation of the impact of such proposed closure which specifies, in addition to other considerations –

(A) the accessibility of alternative health care resources for the population served by such hospital or facility;

(B) the cost effectiveness of such closure;

(C) the quality of health care to be provided to the population served by such hospital or facility after such closure;

(D) the availability of contract health care funds to maintain existing levels of service;

(E) the views of the Indian tribes served by such hospital or facility concerning such closure;

(F) the level of utilization of such hospital or facility by all eligible Indians; and

(G) the distance between such hospital or facility and the nearest operating Service hospital.

(2) Paragraph (1) shall not apply to any temporary closure of a facility or of any portion of a facility if such closure is necessary for medical, environmental, or safety reasons.

(c) Annual report on health facility priority system. (1) The Secretary shall submit to the President, for inclusion in each report required to be transmitted to the Congress under section 801 [25 U.S.C. § 1671], a report which sets forth –

(A) the current health facility priority system of the Service,

(B) the planning, design, construction, and renovation needs for the 10 top-priority inpatient care facilities and the 10 top-priority ambulatory care facilities (together with required staff quarters),

(C) the justification for such order of priority,

(D) the projected cost of such projects, and

(E) the methodology adopted by the Service in establishing priorities under its health facility priority system.

(2) In preparing each report required under paragraph (1) (other than the initial report), the Secretary shall –

(A) consult with Indian tribes and tribal organizations including those tribes or tribal organizations operating health programs or facilities under any contract entered into with the Service under the Indian Self-Determination Act, and

(B) review the needs of such tribes and tribal organizations for inpatient and outpatient facilities, including their needs for renovation and expansion of existing facilities.

(3) For purposes of this subsection, the Secretary shall, in evaluating the needs of facilities operated under any contract entered into with the Service under the Indian Self-Determination Act, use the same criteria that the Secretary uses in evaluating the needs of facilities operated directly by the Service.

(4) The Secretary shall ensure that the planning, design, construction, and renovation needs of Service and non-Service facilities which are the subject of a contract for health services entered into with the Service under the Indian Self-Determination Act are fully and equitably integrated into the development of the health facility priority system.

(5) [Redesignated]

(d) Funds appropriated subject to section 450f of title 25. All funds appropriated under the Act of November 2, 1921 (25 U.S.C. 13), for the planning, design, construction, or renovation of health facilities for the benefit of an Indian tribe or tribes shall be subject to the provisions of section 102 of the Indian Self-Determination Act [25 U.S.C. § 450f].

(e) [Redesignated]

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42 C.F.R. § 36.201(a)

CHAPTER 1 – PUBLIC HEALTH SERVICE,
DEPARTMENT OF HEALTH AND HUMAN SERVICES
SUBCHAPTER C – MEDICAL CARE
AND EXAMINATIONS
PART 36 – INDIAN HEALTH
SUBPART I – CONTRACTS UNDER THE
INDIAN SELF-DETERMINATION ACT

Current through June 17, 1997; 62 FR 32974

§ 36.201 Policy and applicability

(a) Policy

(1) The Congress has recognized the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(2) The Congress has declared its commitment to the maintenance of the Federal Government's unique and continuing relationship with the responsibilities to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

(3) It is the policy of the Secretary of the Department of Health and Human Services to facilitate the efforts of Indian tribes to plan, conduct, and administer

programs, or portions thereof, which the Indian Health Service is authorized to administer for the benefit of Indians.

(4) It is the policy of the Secretary to continually encourage Indian tribes to become increasingly knowledgeable about Indian Health Service programs and the opportunities Indian tribes have regarding them; however, it is the policy of the Indian Health Service to leave to Indian tribes the initiative in making requests for contracts and to regard self-determination as including the decision of an Indian tribe not to request contracts.

(5) It is the policy of the Indian Health Service not to impose sanctions on Indian tribes with regard to contracting or not contracting; however, the special resources made available to facilitate the efforts of those Indian tribes which do wish to contract should be made known to all tribes as should the current realities of funding and Federal personnel limitations.

(6) Contracting is one of several mechanisms by which Indian tribes can exercise their right to plan, conduct and administer programs or portions thereof which the Secretary is authorized to administer for the benefit of Indians. Another mechanism afforded Indian tribes is the use of a grant, as provided in Subpart H of this Part, or other resources, to plan the manner in which it wishes the Indian Health Service to operate a program or portion thereof.

(7) The regulations in this subpart are not meant to and do not change the eligibility criteria which individuals

must meet to be eligible for any program currently operated by the Indian Health Service.

N.M.Stat.Ann. § 7-9-4 (Michie 1995 Repl. Pamp.)

7-9-4. Imposition and rate of tax; denomination as "gross receipts tax".

A. For the privilege of engaging in business, an excise tax equal to five percent of gross receipts is imposed on any person engaging in business in New Mexico.

B. The tax imposed by this section shall be referred to as the "gross receipts tax".

N.M.Stat.Ann. § 7-9-7 (Michie 1995 Repl. Pamp.)

7-9-7. Imposition and rate of tax; denomination as "compensating tax".

A. For the privilege of using tangible property in New Mexico, there is imposed on the person using the property an excise tax equal to five percent of the value of tangible property that was:

(1) manufactured by the person using the property in the state;

(2) acquired outside this state as the result of a transaction that would have been subject to the gross receipts tax had it occurred within this state; or

(3) acquired as the result of a transaction which was not initially subject to the compensating tax imposed by Paragraph (2) of this subsection or the gross receipts tax but which transaction, because of the buyer's subsequent use of the property, should have been subject to the compensating tax imposed by Paragraph (2) of this subsection or the gross receipts tax.

B. For the purpose of Subsection A of this section, value of tangible property shall be the adjusted basis of the property for federal income tax purposes determined as of the time of acquisition or introduction into this state or of conversion to use, whichever is later. If no adjusted basis for federal income tax purposes is established for the property, a reasonable value of the property shall be used.

C. For the privilege of using services rendered in New Mexico, there is imposed on the person using such services an excise tax equal to five percent of the value of the services at the time they were rendered. The services, to be taxable under this subsection, must have been rendered as the result of a transaction which was not initially subject to the gross receipts tax but which transaction, because of the buyer's subsequent use of the services, should have been subject to the gross receipts tax.

D. The tax imposed by this section shall be referred to as the "compensating tax."

Supreme Court, U.S.
FILED
AUG 14 1997
CLERK

No. 97-99

In The

Supreme Court of the United States

October Term, 1996

CENTEX BATESON CONSTRUCTION CO., INC.,

Petitioner,

v.

TAXATION AND REVENUE DEPARTMENT
of the State of New Mexico,

Respondent.

On Petition For Writ Of Certiorari
To The New Mexico Court Of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the special Indian implied-preemption doctrine applies to determine the validity of New Mexico's gross receipts tax imposed on the receipts of a federal contractor from a federal agency for construction of a federal facility on an Indian reservation.

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BRIEF IN OPPOSITION

The Taxation and Revenue Department of the State of New Mexico (Department or State) respectfully requests this Court to deny the Petition for a Writ of Certiorari filed by Centex Bateson Construction Co., Inc. (Centex).

STATEMENT OF THE CASE

Centex's statement of the case is accurate in all respects except two. First, New Mexico's assessment of tax hardly came as a surprise either to Centex or to the federal government. From the beginning of the project, counsel from the Department of Health and Human Services had discussed with the State the State's position that gross receipts tax would be owed on the contractor's receipts. Those discussions led to a contract provision specifying that the federal government would reimburse Centex for the full cost of the tax when appropriate. The hospital was fully completed as planned without reduction for tax payment. The federal government will bear the entire burden of the tax.

Second, the hospital constructed by Centex, although primarily for tribal members, is not exclusively limited to their use. Congress has mandated that the hospital must serve non-Indians in a number of circumstances. 25 U.S.C. § 1680c.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW FOLLOWS THIS COURT'S SUPREMACY-CLAUSE JURISPRUDENCE

A. Authority of a State to Tax a Federal Contractor Building a Federal Facility Has Long Been Settled Law Under the Intergovernmental Tax Immunity Doctrine.

New Mexico's authority for taxing a federal contractor's receipts from performing construction services for an agency of the federal government rests on thoroughly settled law and does not merit reconsideration here. This Court has repeatedly affirmed the authority of states to tax federal contractors under the modern intergovernmental tax immunity doctrine. *United States v. California*, 507 U.S. 746 (1993); *United States v. New Mexico*, 455 U.S. 720 (1982).

Beyond question, New Mexico could tax a federal contractor's receipts from building a U.S. veteran's hospital in Albuquerque, New Mexico. There is no reason to treat any differently Centex's receipts from the construction of this federal Indian Health Service hospital in Shiprock, New Mexico, on the Navajo Reservation. Both hospitals fulfill essential obligations of the federal government for equally deserving constituencies. Certainly, it is not the gravity of the federal obligation that acts to preempt the state tax. Strengthening our nuclear deterrence, at issue in *United States v. New Mexico*, can surely brook no higher priority.

B. The Indian Implied-Preemption Doctrine Does Not Apply to Federal Contractors.

Because of the importance of tax collection to the very existence of state government, this Court has found preemption of state taxes only when Congress has expressly stated its intention to preempt. *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 606 (1943); *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939); *Trotter v. Tennessee*, 290 U.S. 354, 356 (1933).

The only exception to explicit preemption of state tax is the special Indian implied-preemption doctrine upon which Centex relies. But the Indian preemption analysis has been employed exclusively when the taxpayer is a tribal member or a non-Indian taxpayer is dealing with a tribe or a tribal member.[1] The doctrine has never been extended to non-Indian taxpayers contracting with the federal government.

The Court's early formulation of the doctrine in *McClanahan* explained why it is limited only to tribes and tribal contractors. What distinguishes Indian preemption

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[1] *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965) (tax on trading post's sales to tribal members); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (income tax on tribal member on reservation-source income); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (motor carrier and fuel use tax on tribal timber contractor); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980) (tax on sale of farm machinery to tribe); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982) (tax on contractor's receipts from tribal school board for building tribal school); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (tax on tribal oil and gas lessee).

from normal preemption is that Indian sovereignty is brought into play: "it provides a backdrop against which the applicable treaties and federal statutes must be read." 411 U.S. at 172. The Court in *Bracker* confirmed tribal sovereignty as key: "The unique origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law." 448 U.S. at 143. In *Cotton*, the Court explicitly described this unique form of implied-preemption in terms of *tribal* contractors: "for private parties doing business with Indian tribes, federal pre-emption is not limited to cases in which Congress has expressly – as compared to impliedly – preempted the state activity." 490 U.S. at 176-177. That the tribes may have acted in these cases with federal approval or federal money does not alter the fact that it was the tribes who were acting and whose sovereign interests needed to be weighed.

The fundamental constitutional relationship between the federal government, tribes, and states explains why Indian implied-preemption is limited to tribal contractors. When the federal government opts to have a federal contractor perform a service for it, Congress has authority under the Supremacy Clause to preempt state tax on that contractor whenever necessary to protect some vital federal interest. When a tribe contracts with a private entity to perform a service, however, the tribe itself does not have the authority to preempt state tax, no matter how vital those services might be to the tribe. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156 (1980). The Indian implied-preemption doctrine, therefore, incorporates a unique sensitivity to tribal

undertakings and "has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145. No such judicial balancing-of-interests test is needed for federal contractors. Congress could have preempted the state tax here if it believed it necessary, but Congress chose not to.

The contract here is between Centex and the federal government. The tribe may be the beneficiary of this federal project, just as other groups benefit from other federal projects, but neither tribal action nor tribal sovereignty is implicated. This distinction is highlighted by the fact that the tribe could have invoked its sovereignty under the Indian Self-Determination Act, 25 U.S.C. § 450, by taking over responsibility for building this hospital. Had it done so, the contractor would have been dealing with the tribe and the Indian preemption analysis would have applied to weigh the tribe's interest. *Cf Ramah*. But instead, the tribe chose to leave to the federal government the responsibility for providing this health care service. As a result, the tribe's sovereignty is not at issue.

Contrary to Centex's claim, the decision below is fully consistent with all Supremacy Clause decisions of this Court, both those concerning intergovernmental tax immunity and those creating Indian preemption. The decision follows the black letter of these Indian preemption decisions by limiting the doctrine to cases where the taxpayer is dealing with a tribe. It also follows the spirit and intent motivating the doctrine which is to provide a heightened weighing of tribal interests in interpreting federal law when a tribe asserts its sovereignty. The tribe

chose not to assert its sovereignty here. This remained a federal project. The decision below was correct and review by this Court is unnecessary.

II. THERE IS NO CONFLICT AMONG FINAL STATE COURT DECISIONS ON THIS ISSUE

Centex alleges a "preliminary" conflict between the decision below and a recent Arizona Court of Appeals decision concerning the Blaze Construction Company.[2] As yet, the decision of this intermediate Arizona court is not final. Indeed, it may not be the last word in the Arizona *Blaze* litigation any more than the intermediate appellate court decision was in the New Mexico *Blaze* litigation.[3] The New Mexico Supreme Court correctly reversed that lower court decision. Its analysis was consistent with the most recent precedents of this Court recognizing that the Indian preemption analysis is limited to activity within Indian Country involving tribes or tribal members. *See Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214 (1995).

There is no conflict between final state court decisions that would justify review by the Court at this time.

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[2] *State of Arizona ex rel. Arizona Department of Revenue v. Blaze Construction Company*, 242 Ariz. Adv. Rep. 3, 1997 WL 205799 (Ct. App. 1997). Petition for review is pending in the Arizona Supreme Court.

[3] *Blaze Construction Company, Inc. v. Taxation and Revenue Department*, 117 N.M. 362, 871 P.2d 1368 (Ct. App. 1993), *reversed*, 118 N.M. 647, 884 P.2d 803 (1994), *cert. denied*, 115 S.Ct. 1359 (1995).

III. THE QUESTION PRESENTED HAS BEEN CORRECTLY RESOLVED BELOW

Two years ago in the New Mexico *Blaze* litigation, Blaze's petition for certiorari presented this Court with the exact same issue that Centex now resubmits. The Court found no reason to grant certiorari then. 115 S.Ct. 1359 (1995). Nothing has changed within the last two years to warrant the Court's reconsideration now. The issue is important, certainly, but it was resolved correctly below.

Throughout this litigation, Centex has repeatedly obscured the distinction between the threshold question of whether the Indian preemption doctrine applies and the actual application of the doctrine itself. Again in its petition, Centex cites purportedly comprehensive federal legislation detailing the provision of health care services to the Indians as a reason to strike down the state tax. But "comprehensive federal regulation" would be germane only if one were using preemption *by implication*, the hallmark of Indian preemption. Because Centex has contracted with the federal government and not a tribe, express preemption is the standard. It is simply irrelevant how New Mexico's tax might have fared under an implied-preemption analysis. There was no reason for the Department's Hearing Officer to explore the relative burdens on state, federal, and tribal interests.

Nonetheless, even looking down that road, the burden of providing health care services to Indians does not rest exclusively with the federal government. Federal courts have recognized the state's obligation to share that responsibility. *See McNabb v. Bowen*, 829 F.2d 787, 794-795

(9th Cir. 1987) ("Congress did not intend that the federal government be exclusively responsible for Indian health care. It contemplated that the IHS would aid Indians in taking advantage of state and local programs, with the federal government meeting health care needs not met under those programs.") The State of New Mexico and San Juan County have the obligation to provide medical care to all indigent residents of the county, including indigent Navajos living on the reservation. N.M. Stat. Ann. §§ 27-5-1 *et seq.* (1995 Repl. Pamp.). The gross receipts tax assessed against Centex on its receipts from constructing this hospital will be distributed to the state and county and used partially to fulfill these responsibilities. Under these circumstances, even an implied-preemption analysis would likely lead to the same result.

One thing is undisputed about this federal legislation providing for Indian health care – it does not purport to preempt state tax imposed on federal contractors hired by the federal government to furnish those services. Absent such express preemption, the intergovernmental tax immunity doctrine of *United States v. New Mexico* supports New Mexico's tax assessment on Centex.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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